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The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma

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THE SCARLET LETTER: THE SUPREME COURT AND THE LANGUAGE OF ABORTION STIGMA

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> Mother, n. **1.a.** The female parent of a human being; a woman in relation to a child or children to whom she has given birth . . . — OED[1]

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child . . . It is self-evident that a mother who comes to regret her choice to abort must struggle with grief . . . — *Gonzales* v. *Carhart*, (Kennedy, J.)[2]

Why does the Supreme Court refer to the woman who is seeking an abortion as "mother"? Surely the definition has not escaped the attention of a Court that frequently relies on the dictionary to define important terms or

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1. *Mother Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com (last visited Sept. 11, 2012).
2. 550 U.S. 124, 159 (2007).

principles.[3] And why does the Court choose to describe the fetus as a child? What message does this language send about abortion and the woman who seeks an abortion?

The Court's abortion decisions embody an ongoing debate on the legitimacy of constitutional protection of the right to choose. This debate unfolds most obviously as a discourse on constitutional interpretation; disagreements within the Court are reflected in the language of constitutional principles and standards. This debate also plays out, hidden in plain view, in the vocabulary used by the Court to describe the woman who stands at the center of the constitutional controversy and the life within her.

The Court's abortion jurisprudence, which began with an unequivocal articulation of the right to choose as a fundamental right, has devolved into a patchwork of decisions reflecting ambivalence about a woman's right to choose or clear efforts to de-constitutionalize the right. Not surprisingly, the rhetoric that emerges in the opinions often tracks the discord within the Court. The woman whose dignity and equality depend upon reproductive self-determination appears in conjunction with a strong articulation or affirmation of the right to choose. By contrast, the woman often is missing from decisions diluting the right to choose; if she appears it will be in the role of passive patient, mother, or mere body part. Often, the Court's nomenclature for developing life corresponds to its description of the woman, with the pairing of mother and child most evident in decisions hostile to the right to choose.

The abortion opinions reveal multiple, and conflicting, narratives about the status and dignity of both the woman and the developing life. For the woman, at least some of these narratives reflect stereotypes about women's judgment and morality. The narratives themselves often are at odds with what the Court actually does, as in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[4] where the Court coupled a robust description of the significance of the right to choose with a constitutional standard that diminished the very self-determination and equality exalted by the Court.

The vocabulary in the Court's abortion jurisprudence displays an ongoing, and increasing, politicizing of the discord within the Court. What began in *Roe* as a potpourri of references to woman, mother, fetus, and child has morphed into a careful and fairly predictable construction of vocabulary that reflects the polarization of opinion. For example, in *Roe*, the majority

3. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 491 (1999) (using two dictionary definitions of "substantially" to deny rights under the ADA), *superseded by statute*, Pub. L. No. 110–325, 122 Stat. 3553 (2008); Roe v. Wade, 410 U.S. 113, 159–60 (1973) (using DORLAND'S ILLUSTRATED MEDICAL DICTIONARY to define the stages of growth of a fetus and viability).

4. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852–54, 868–69 (1992).

opinion by Justice Blackmun used the term "woman" slightly more frequently than the term "mother."[5] In *Casey*, the joint opinion used the term "woman" over one hundred times.[6] "Mother" was named only nine times, three of which involved quotations from earlier opinions.[7] Although the use of the terms "woman" and "mother" are often key to the Court's construction of the abortion debate, these terms are only part of the broader vocabulary employed by the Court to describe the issues and interests at stake. The narratives constructed through this vocabulary reveal more than constitutional principles; they disclose how the Court identifies and assesses the social values at the heart of the abortion controversy. The language used by the Court thus becomes part of the social discourse, a high profile, highly public commentary that becomes the foundation for further political strategy and action.

Abortion stigma is a social construct, generated through political and legal discourse. The recent explosion of anti-choice legislation in Congress and state legislatures is a strong indicator of the increasing stigmatization of abortion. These measures can readily be characterized as an assault on the moral authority of women. Laws mandating invasive ultrasounds, biased counseling sessions, and onerous waiting periods, along with fetal "personhood" and fetal pain laws, are intended to shame and punish women who seek abortions.

The opinions of the Court, beginning with *Roe*, mediate abortion stigma through both language and legal standards. The Court's framing of the abortion procedure, of the woman and physician, and of prenatal life has contributed to the ascendancy of abortion stigma. *Casey*, in particular, marks a turning point, where the Court's overt expression of moral disgust with abortion correlates with diminished constitutional protection.

This article examines how the abortion decisions contribute to abortion stigma. It argues that several narratives emerge from the vocabulary deployed by the Court to describe both the woman who seeks an abortion and prenatal life. These narratives serve a potent expressive function. Most display considerable ambivalence about the moral authority of women, particularly women who decide, even temporarily, not to become mothers. From *Roe* onward, the Court has reinforced abortion stigma through discourse as well as constitutional standards. This stigma marginalizes both the abortion procedure and the woman who seeks an abortion. This marginal-

5. The opinion referred to "woman" thirty-eight times and "mother" twenty-six times. *Roe*, 410 U.S. 113.

6. *Casey*, 505 U.S. 833.

7. *Casey*, 505 U.S. at 879, 912 (citing *Roe*, 410 U.S. at 163–65).

ization, in turn, provides justification for increasing restrictions on a woman's access to abortion.

Part I considers the significance of the language used by the Court in the generation of abortion stigma. Part II examines the narratives constructed by the Court concerning the woman who may seek an abortion. The focus primarily is on three key abortion cases, *Roe*, *Casey*, and *Gonzales v. Carhart* (*Carhart II*), although other cases also are considered. As the two landmark abortion decisions, *Roe* and *Casey* are focal points for obvious reasons; *Carhart II,* the most recent major decision, provides significant insights into the potential future of abortion jurisprudence. Part III considers the narratives about prenatal life and how they correspond to the depiction of the woman. Part IV evaluates the narratives as they relate to the constitutional standards developed by the Court. Part V argues that the narratives constructed by the Court serve both expressive and normative functions, acting to reinforce abortion stigma and narrow the constitutional legitimacy of reproductive freedom.

I. GRAND ILLUSION

A. Language and Narrative

Language reflects common understandings within a social context.[8] Language also plays a central role in social change movements, as competing interests seek to capture the terminology of public discourse.[9] Two types of rhetorical methods, identified in this article as vocabulary and narrative, are particularly relevant to discussion of social and legal discourse.[10] Vocabulary includes characterization and ultimate terms.[11] A *characterization* is a "universalized depiction[ ] of important agents, scenes, purposes or methods," such as the use of "back alley" to evoke the horrors of illegal abortions.[12] *Ultimate terms*, or ideographs, are "special words or phrases that express the public values that provide the 'constitutional' commitments of a community," such as liberty or life.[13]

8. CELESTE MICHELLE CONDIT, DECODING ABORTION RHETORIC 4, 14 (1990); L.H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY 6, 11 (1995).
9. LARUE, *supra* note 8, at 6, 11; CONDIT, *supra* note 8, at 5–6, 96–98, 106–07.
10. CONDIT, *supra* note 8, at 13–14. "Rhetoric" can be defined as simply as the "art of persuasion" or as complexly as "a conscious perspective on language that sees it as a means not of interpretation but of the product of a broad range of 'texts.'" FRANCES J. RANNEY, ARISTOTLE'S ETHICS AND LEGAL RHETORIC: AN ANALYSIS OF LANGUAGE BELIEFS AND THE LAW 10, 17 (2005).
11. CONDIT, *supra* note 8, at 13.
12. *Id.* at 14.
13. *Id.* at 13.

Narrative, widely used in American jurisprudence, is a powerful rhetorical device.[14] Narratives often take the form of "social myths," which "tell important truths, but . . . leave out important ingredients, and, hence, distort."[15] The persuasive value of narrative lies largely in its ability to engage the audience in an empathetic or sympathetic response.[16] For example, the 1950s criminal abortion law reform movement was successful, in part, because narratives of illegal abortions were used to bring the issue to the public discourse forefront in a way that was palpable to the white, middle-class majority.[17] These narratives relied on the archetype of woman as victim, confronting the prospect of illegal abortion when her pregnancy resulted from rape or incest, or when it presented severe health issues to herself or the fetus.[18]

In the debates about abortion regulation, both sides of the dispute also seek to dominate the terms of public discourse through vocabulary. Their strategy is similar: reduce complex and controversial issues into simple, powerful, and opposing paradigms.[19] The paradigms are readily identifiable by their ultimate terms: choice/life, woman/mother, fetus/baby, abortionist/physician, dignity/murder.[20] These differentiations in turn are incorporated into the abortion narratives. This very public rhetoric finds its way into court documents, oral arguments, and, ultimately, court opinions.[21]

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14. *Id.*
15. *Id.*
16. *Id.* at 25. Typically, the protagonists of successful narratives must be "ordinary people" because that creates "identification" of the audience with them, and large-scale change requires that a large number of people feel affected by the particular social evil at issue. *Id.* at 26. Successful narratives are "emotionally compelling," "socially effective," and "well designed." *Id.* at 27–28.
17. *Id.* at 23.
18. *Id.* at 25–26. These narratives were:

> *strategic* adaptation[s] of women's experiences. . . . To be persuasive to the dominant audience, the stories had to *use* rather than *confront* the beliefs and social conditions [such as the nuclear family and woman's primary role as mother] in the existing American repertoire. The abortion story did so by respecting the crucial values and characterizations of the culture while redefining the act of abortion itself.

Id. at 25 (emphasis in original).

19. *Id.* at 61–63.
20. *Id.* "Abortionist," used in cases such as Casey to describe the physicians who perform abortions, means "[a] person who carries out or induces abortions, [especially] illegally or in secret." *Abortionist Definition*, OXFORD ENGLISH DICTIONARY, *supra* note 1.
21. *See, e.g.*, Gonzales v. Carhart (*Carhart II*), 550 U.S. 124, 159 (2007) (noting the "bond of love the mother has for her child" when discussing abortion and her potential for "regret"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, (1992) (Scalia, J., dissenting) ("The whole argument of abortion opponents is that what the

Judicial opinions frequently employ narrative to distill complex factual or legal issues into a coherent and simplified theme. This distillation process necessarily selects certain facts and truths; it disregards and omits others. The construction of the judicial narrative from this information includes the selection of rhetorical vocabulary.[22] The parties before the Court compete to persuade the Court to employ both their legal arguments and their vocabulary.[23] The socio-rhetorical vocabulary employed in the political arena gains legitimacy and power when the Court incorporates that language into legal analysis.[24]

The vocabulary deployed by the Court thus constructs far more than the metes and bounds of legal norms. The abortion decisions embody both legal and social discourse. The language of legal discourse illuminates the social constructs and assumptions that underlie the articulation of legal norms.[25] Thus the terminology selected by the Court invokes norms and expectations about both the pregnant woman and prenatal life.[26] The narra-

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Court calls the fetus and what others call the unborn child is a human life."); Roe v. Wade, 410 U.S. 113, 159 (1973) ("[I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of the health of the mother or that of the potential human life, becomes significantly involved."). *See also* Brief for Sandra Cano et al. as Amici Curiae Supporting Petitioner, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05–380) (2006 WL 1436684) (arguing against the health exception, offering 180 affadivits of women who previously had abortions). The Court cites to this brief to support its conclusion that "some women come to regret their choice to abort an infant life they once created and sustained." *Carhart II*, 550 U.S. at 159. *See also* Brief for the National Organization for Women as Amicus Curiae Supporting Appellees, Webster v. Repro. Health Serv., 492 U.S. 490 (1989) (No. 86–605) (1989 WL 1127691) (arguing that the Court should retain the right to choose).

22. CONDIT, *supra* note 8, at 96.
23. *Id.*
24. *Id.* "Once . . . competing vocabularies are developed, advocates frequently move the discussion into the domain of the law in order to place the coercive power of the state behind their vocabularies, and, hence, their interests." *Id.*
25. *See, e.g.*, MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE (1969); MICHEL FOUCAULT, DISCIPLINE AND PUNISH 92–101 (1975) (explaining that the government creates standards through punishment); MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY 146–47 (Robert Hurley trans., Vintage Books 1990) (1976) (discussing "the hysterization of women").
26. *See, e.g.*, Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning, in* FEMINIST LEGAL THEORY: FOUNDATIONS 571, 575–76 (D. Kelly Weisberg ed., 1993) (discussing gendered abortion jurisprudence which pits the woman's interest against that of the fetus and male society, presupposing that the "opposing" interests are necessarily not "symbiotically linked"); Margot Stubbs, *Feminism and Legal Postivism, in* FEMINIST LEGAL THEORY: FOUNDATIONS 454, 454–56 (D. Kelly Weisberg ed., 1993) (discussing the detrimental impact of moral analysis within the law on "the development of a feminist critique of law").

tives created through this terminology reflect, ultimately, a debate about the moral value of women who seek abortions.[27] This debate remains grounded in the relationship between woman and mother. Legislation regulating abortion serves as the most overt example of how women seeking abortions are judged for their deviance from the role of mother. Statutory exceptions for rape, incest, or where there is risk to the pregnant woman's life or health demarcate the line between woman as subject and woman as object or woman as actor and woman as victim. No such exceptions exist to account for economic, education, or career hardships.

The moral judgments embodied in positive law find less obvious expression in the language the Court uses to evaluate abortion legislation. This language reveals an increasing inclination to identify woman as mother. When the Court employs the mother narrative in its discourse on abortion, it reinforces the stigma that women who seek abortions fail the social expectations constructed for femininity.

B. Stigma

Stigma is a powerful tool of social control. The dictionary defines stigma as "a mark of disgrace."[28] Erving Goffman defines stigma as an "attribute that is deeply discrediting" that reduces the bearer "from a whole and usual person to a tainted, discounted one."[29] Abortion stigma can be defined as a "negative attribute ascribed to women who seek to terminate a pregnancy that marks them, internally or externally, as inferior to ideals of womanhood."[30] These ideals evoke traditional stereotypes that allow female sexuality only for procreation, identify women as mothers, and expect nurturing and self-sacrificing behavior.[31]

Abortion stigma is generated through social, political, economic, and legal institutions that depict abortion as deviant and women who seek abortions as "promiscuous, sinful, selfish, dirty, irresponsible, heartless or murderous."[32] Abortion has a long history of association with stigma. Women who sought abortions were shamed for violating cultural stereotypes that required women to refrain from non-procreative sex and to embrace their

27. *See, e.g.*, Carhart II, 550 U.S. 124, 128–29 (2007).

28. *Stigma Definition*, OXFORD ENGLISH DICTIONARY, *supra*, note 1.

29. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 3 (1963).

30. Anuradha Kumar et al., *Conceptualising Abortion Stigma*, 11 CULTURE, HEALTH & SEXUALITY 625, 628 (2009).

31. *Id.*

32. *Id.*

roles as mothers.[33] Abortion was identified with out-of-wedlock sex, promiscuity, and prostitution.[34] And prior to *Roe,* the culture of "back alley" abortions marked abortion as criminal, dirty, and harmful to women.[35]

The legalization of abortion did not eliminate the stigma. In fact, the backlash against legalized abortion suggests an enduring legacy of stigma. Restrictions on access to abortion and intrusive informed consent requirements send a message that abortion is immoral. The exclusion of abortion coverage from government and, increasingly, private health insurance demonstrates how political and economic policies create abortion stigma. Terminology and framing discourse are critical tools. One powerful example of how language generates stigma is the use of "abortionist" to characterize the physician who performs the procedure.[36]

Stigma as defined in the research literature typically includes multiple components.[37] For the purposes of this article, I rely on a theory of stigma generation proposed by Link and Phelan that captures the complex dynamics of how stigma is produced and reproduced. They conceptualize the components of stigma creation as follows: (1) LABELING—the dominant culture identifies and labels human differences; (2) STEREOTYPING—the dominant culture links the labeled persons to undesirable characteristics; (3) SEPARATION—the labeled persons are then distinguished from the dominant culture; (4) STATUS LOSS AND DISCRIMINATION—those labeled "them" experience loss of status and/or discrimination.[38] Finally, the generation of stigma depends upon social, economic, or political power inequities that permit both the construction of stereotypes and the consequences of disapproval or discrimination.[39]

Law mediates the role of stigma in society in a variety of ways. Law can prevent stigma from serving as a justification for discrimination.[40] Law

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33. *Id.*; *see also* Richard W. Bourne, *Abortion In 1938 and Today: Plus Ça Change, Plus C'est La Même Chose,* 12 S. CAL. REV. L. & WOMEN'S STUD. 225, 229 (2003) (describing one woman's experience).

34. *See* Bourne, *supra* note 33, at 229–30 n.15, 247.

35. Alison Norris et al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences,* 21:3S WOMEN'S HEALTH ISSUES S49, S52 (May 2011), *available at* http://www.guttmacher.org/pubs/journals/Abortion-Stigma.pdf.

36. Stenberg v. Carhart (*Carhart I*), 530 U.S. 914, 953–54 (2000) (Scalia, J., dissenting), 957–60, 964–65, 968, 974–76 (Kennedy, J., dissenting). *See also,* Justice Kennedy's majority opinion in *Carhart II,* where he shifts language from "abortionist" to "abortion doctor." 550 U.S. 124, 138, 144, 154–55, 161, 163 (2007).

37. Norris, *supra* note 35, at S52.

38. B. Link & J.C. Phelan, *Conceptualizing Stigma,* 27 ANN. REV. OF SOC. 363, 367 (2001).

39. *Id.*

40. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

can remedy the harm caused by stigma.[41] Law may also be a means through which stigma is generated or reinforced.[42] Sometimes the creation of stigma is deliberate social policy, as in anti-smoking policies that may stigmatize smokers.[43] Law, less directly, also serves a potent expressive role in the generation or diminishment of stigma. Legal standards and legal analysis may reinforce or reject stigma. This is particularly true when the courts address controversial social issues. The holding of the case and the attendant legal standard will have substantial impact on the mediation of stigma. But the language and assumptions employed by a court may also send powerful messages concerning stigma.

The terminology and framing discourse found in the Court's abortion jurisprudence contribute to the social construction of abortion stigma. The Court's abortion decisions are marked by ambivalence, and at times hostility, toward abortion and the women who seek abortions. The political discourse of fetal personhood is increasingly reproduced in Court opinions. What the Court says about a woman who seeks an abortion, and about prenatal life, communicates not simply legal judgment but a moral assessment that in turn shapes public discourse.

II. SCENT OF A WOMAN

Who are the characters that populate the morality plays embedded in the Supreme Court decisions on abortion? Surprisingly, with the exception of *Casey*, the Court offers very little direct discussion of the woman who seeks an abortion, her life, her needs, her challenges.[44] The narratives constructed by the Court instead are developed through vocabulary and through how the discourse on abortion is framed. The female figure is at times cast in the leading role, sometimes as woman, sometimes as mother. On other occasions the female role becomes supporting, overshadowed by the prominence given the "baby" or the "child." In some circumstances, the female lead disappears, reduced to a collection of body parts, reminiscent of Picasso's women, or to a state of invisibility.

Given the conflict of values embraced by the Court, it is not surprising that the depiction of the woman who may seek an abortion varies from

41. *Brown*, 347 U.S. at 494.

42. Scott Burris, *Stigma and the Law*, 367 THE LANCET 529, 530 (2006); Kumar, *supra* note 30, at 631.

43. *See* Burris, *supra* note 42, at, 367. The law may also perpetuate existing stigma, as in the Defense of Marriage Act, 1 U.S.C. § 7 (1996). MARK PHILLIP STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 151–52 (1997).

44. Planned Parenthood of Se. Pa. v. Casey, 505 U.S 833, 928–29 (1992). *Roe* includes a brief discussion of the problems an unwanted pregnancy may pose. Roe v. Wade, 410 U.S. 113, 153 (1973).

decision to decision. These narratives exist as subtext to the formalized discussions of undue burdens, fundamental rights, and liberty. The choice of woman or mother as the central character stimulates several related narratives. The "mother" monologues typically embody the anti-choice narrative for, obviously, the very definition of mother belies the validity of choice. The story of the "woman" who appears in the Court's opinions is more complicated. While she may at times be an autonomous person capable of self-determination and worthy of dignity, woman also plays the foil to mother. In this she represents the dehumanized, selfish pursuer of convenience. Or she appears as the passive recipient, incapable of sound judgment, or the vulnerable social being. And it is woman, not mother, who is reduced to body parts or rendered invisible.

Conflicting narratives often overlap within the same decisions, punctuating the Court's ambivalence. If we examine these narratives, what generally emerges is the use of traditional stereotypes to attribute negative characteristics to the woman who seeks to terminate her pregnancy.

A. Woman Under the Influence

The narrative of woman as the passive recipient begins with *Roe*. Although the *Roe* Court concludes that the right of privacy, found in the Fourteenth Amendment's "concept of personal liberty," is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[45] *Roe* does not emphasize the decision-making autonomy of the woman. To the contrary, the Court deems the woman a passive object in her pregnancy when it asserts, "[t]he pregnant woman cannot be isolated in her privacy."[46] This singular phrase opens the door for what will become the state's looming presence throughout the pregnancy. In *Roe*, both the state and the physician own a stake in her pregnancy and she must cede part of her privacy to their interests.[47] The state enters the pregnancy during the second trimester to regulate in furtherance of the woman's health; it remains until birth to protect prenatal life.[48] The physician's interests go even further, spanning the entire pregnancy, and it is the authority of the physician, not the woman, that the Court emphasizes.[49]

45. *Roe*, 410 U.S. at 153.
46. *Roe*, 410 U.S. at 159.
47. *Roe*, 410 U.S. at 150–52.
48. *Roe*, 410 U.S. at 164–65.
49. *See, e.g.*, *Roe*, 410 U.S. at 163 ("This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."); *Id.* at 165–66 ("The decision vindicates the right of the physician to administer medical

Roe may begin with a statement of autonomy but it ends with the woman being reduced to the battleground on which the state and the physician stake out their interests.[50] The Court equivocates even on the extent of a woman's authority during the first trimester, when the decision to abort is subject only to the most minimal health regulation.[51] As the Court makes clear, it is the physician's concerns rather than the woman's that prevail during the first trimester. The Court's summary of its groundbreaking decision reduces the woman to passive object when it describes the right to choose during the first trimester as a decision that "must be left to the medical judgment of the pregnant woman's attending physician."[52] The Court goes further by suggesting that it must balance primarily the interests of the state and the physician:

> The decision vindicates the right of the physician to administer medical treatment . . . up to the points where important state interests provide compelling justifications for intervention. Up

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treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention.").

50. *See, e.g.*, Linda Greenhouse, *How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse*, 42 SUFFOLK U. L. REV. 41, 47–48 (2008).

> The brief on the merits for Jane Roe told the Court that under the Texas law, "When pregnancy begins, a woman is faced with a governmental mandate compelling her to serve as an incubator for months and then as an ostensibly willing mother for up to twenty or more years," perhaps causing her to forgo education and career and "endure economic and social hardships." . . . [but] the Court was clearly responsive to the brief filed by a coalition of medical groups, [which told the Court] the Texas law was a "serious obstacle to good medical practice," . . . imposing restrictions that "interfere with the physician-patient relationship and with the ability of physicians to practice medicine in accordance with the highest professional standards."

Id. (citing Brief on the Merits for Appellants at 106; and Brief of the Am. Coll. Of Obstetricians & Gynecologists et al. as Amici Curiae Supporting Appellants at 2, Roe v. Wade. 410 U.S. 113 (1973)).

51. *Roe*, 410 U.S. at 163.

52. *Roe*, 410 U.S. at 164. A law clerk for Justice Powell expressed concern about the direction of Justice Blackmun's draft opinion, and attempted to preempt the opinion's emphasis on the role of the physician. The clerk wrote a memo to Justice Powell, urging him to take the matter up with Justice Blackmun, saying, "Doesn't it seem that this language overstates the doctor's role and undercuts the woman's personal interest in the decision? All medical decisions are the product of an agreement between patient and doctor. I see no reason, therefore, not to add a clause to this sentence indicating that the abortion decision must rest 'with the physician *and his patient.*'" Greenhouse, *supra* note 50, at 42 (citing Memorandum from Larry A. Hammond to Justice Lewis F. Powell, Jr., Supreme Court of the U.S. (Nov. 27, 1972)).

> to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.[53]

Decisions after *Roe* continued to emphasize the dominance of the physician. One such decision stated, "*Roe* stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out."[54] The Court, on occasion, offers the patient a partnership with her physician, as in *Planned Parenthood of Central Missouri v. Danforth*,[55] where the Court rejects the authority of the state to exercise a "veto over the decision of the physician and his patient to terminate the patient's pregnancy."[56] But more typically, the right to choose is depicted as primarily a medical issue where the physician is the actor and the woman the object. Thus when the Court emphasizes abortion as a "medical procedure," it shifts the expertise for the decision from woman to physician while at the same time suggesting that part of the woman's right to choose is allowing her physician to make the appropriate medical decision: "[T]he full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment."[57] In this scenario, even the woman's decision becomes passive in the face of the physician's control because "[t]he physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking [sic] process and implementing her decision."[58] The physician's potential liability under abortion statutes certainly justifies consideration of the doctor's interests. But the Court's discussion of choice does not distinguish between the physician's interests and the woman's. To the contrary, her decision, and thus her right, becomes dependent upon the judgment of the physician. This judgmental dependency reinforces the depiction of woman as object rather than subject. Most notably, it subsumes the choice protected by *Roe* within the physician's medical judgment.

B. What Women Want

Closely related to the narrative of woman as object is the construct of a woman who acts but whose judgment cannot be trusted. Her decision to

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53. *Roe*, 410 U.S. at 165–66.
54. Colautti v. Franklin, 439 U.S. 379, 387 (1979).
55. 428 U.S. 52 (1976).
56. 428 U.S. at 74.
57. *Akron I*, 462 U.S. 416, 427 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
58. *Akron I*, 462 U.S. at 427.

terminate an abortion is the product of irrational thinking; the state is justified in asking her to reconsider. Distrust of woman's judgment is pervasive throughout law and history.[59] The pre-*Roe* laws prohibiting abortion except when the woman's life or health was at stake assume that a woman's judgment about when to seek an abortion is insufficient. In modern abortion legislation, this distrust emerges in onerous informed consent laws and laws mandating twenty-four-hour waiting periods.[60] Restrictive abortion laws with exceptions for pregnancies caused by rape and incest reflect hostility toward women who do not meet the socially accepted role of victim. A great deal has been written already about how these types of laws rest on stereotypes about women's judgment and moral authority but a few points are worth emphasizing here for they relate to the broader question of narrative developed by the Court.[61]

The parameters of the debate over women's judgment were set in *Roe* and its companion case, *Doe*.[62] The *Roe* majority's protection of the woman's right to choose without the state fully dictating the terms of that choice evoked antipathy from the dissent.[63] Justice White disparaged women's moral authority by characterizing the right to choose as one that "values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus."[64] This rejection of women's judgment provides the justification for the invisibility of women in later decisions advancing the moral authority of the state to protect fetal life.[65]

Under *Roe*, the Court struggled to distinguish between permissible medical procedures and impermissible stereotyping. The respect for woman's decision-making found voice in the Court's insistence that the state could not enact abortion regulations "designed to influence the woman's informed choice between abortion or childbirth."[66] The Court upheld narrowly tailored informed consent requirements relevant to health but rejected numerous sweeping laws and twenty-four-hour waiting periods that

59. Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 463–70 (1995).

60. *See, e.g.*, MISS. CODE ANN. § 41–41–33 (West 1996); 18 PA. CONS. STAT § 3205 (West 1989); WIS. STAT. ANN. § 253.10(3)(a)–(c) (West 2011).

61. *See, e.g.*, Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 368 (2010); B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 510–14 (2009); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223 (2009).

62. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

63. *Roe*, 410 U.S. at 153.

64. *Doe*, 410 U.S. at 221 (White, J., dissenting).

65. *See, e.g.*, *Carhart II*, 550 U.S. 124, 159–63 (2007); Webster v. Reprod. Health Servs., 492 U.S. 490, 405–07, 520 (1989).

66. *Akron I*, 462 U.S. 416, 444 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505. U.S. 833 (1992).

posed substantial burdens and were calculated to persuade women to forego abortion.[67] As the Court described an invalid informed consent requirement in *Thornburgh v. American College of Obstetricians and Gynecologists*,[68] "The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."[69] At the same time, the Court often displayed considerable ambivalence towards the woman's exercise of judgment. In *Planned Parenthood of Central Missouri v. Danforth*,[70] the Court upheld an informed consent requirement, despite the fact that the only other procedures subject to similar restrictions by the state were those performed on persons committed to mental or correctional institutions.[71] The Court found the special treatment of abortion justified because "[t]he decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences."[72] The Court's readiness to view abortion regulation as unique ignores the relationship between laws mistrusting women's judgment and the gendered essence of the abortion decision. Chief Justice Burger's dissent in *Thornburgh* exemplifies this indifference, recognizing that informed consent requirements for abortion differ from other medical procedures without questioning why: "Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures?"[73]

The Court's shift to the undue burden standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[74] allows states to incorporate mistrust of women's judgment into social policy. Overruling *Akron I* and *Thornburgh* to the extent these cases invalidated state requirements mandating truthful, non-misleading information about abortion, *Casey* pivots to a deferential standard that goes a long way towards insulating informed consent requirements and twenty-four-hour waiting periods from facial challenge.[75] *Casey's* recasting of the informed consent debate undermines the legitimacy of a woman's decision in two significant ways. As in previous cases, the Court accepts the implicit assumption that the state is justified in protecting women from their potential lack of serious and informed consideration of the abortion decision.[76] But the *Casey* reasoning goes further, approving

67. *Akron I*, 462 U.S. at 452.
68. 476 U.S. 747 (1986).
69. 476 U.S. at 759.
70. 428 U.S. 52 (1976).
71. 428 U.S. at 66 n.6 (citing MO. REV. STAT. § 105.700 (1969)).
72. 428 U.S. at 67.
73. *Thornburgh*, 476 U.S. at 783 (Burger, C.J., dissenting).
74. 505 U.S. 833 (1992).
75. 505 U.S. at 881–87.
76. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881–84 (1992).

state efforts to dissuade a woman from her decision to seek an abortion and pitting the state's interest in protecting prenatal life as a valid challenge to the woman's judgment. The joint opinion in *Casey* describes the informed consent requirement as a legitimate attempt "to ensure that a woman apprehend the full consequences of her decision," so that she will not "discover later, with devastating psychological consequences, that her decision was not fully informed."[77] Likewise, the twenty-four-hour waiting period struck down in prior cases is upheld with no recognition by the Court of the stereotype it embraces through this language: "[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable . . . ."[78]

Casey's rejection of *Roe*'s trimester analysis, in large part because it fails to give sufficient weight to the state's interest in prenatal life,[79] allows the state to challenge directly the judgment of the woman with the full weight of its authority. The very premise of the Court's earlier rejection of informed consent regulations and waiting periods was that state efforts to dissuade a woman from her choice of abortion were per se illegitimate precisely because they showed a lack of respect for her decision.[80] *Casey*'s sleight of hand in recasting these laws as legitimate illuminates how the constitutional standard can be impacted by a shift from a narrative of moral authority to one of questionable moral competence. Unlike *Roe*, *Casey* allows potentially two state "checks" on a woman's judgment before she is allowed to act on her decision.

The altered narrative underlying *Casey*'s validation of informed consent and waiting periods is not lost on the dissents. Justice Blackmun calls laws designed to dissuade a woman from her decision "the antithesis of informed consent."[81] Justice Stevens, in dissent, recognizes the Court's acceptance of the twenty-four-hour waiting period for what it is, a burden that is predicated "on outmoded and unacceptable assumptions about the decisionmaking capacity of women."[82] A law based on respect for women would recognize that "[n]o person undertakes such a decision lightly," and that "States may not presume that a woman has failed to reflect adequately merely because her conclusion differs from the State's preference."[83]

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77. *Casey*, 505 U.S. at 882.
78. *Casey*, 505 U.S. at 885.
79. *Casey*, 505 U.S. at 873.
80. *Casey*, 505 U.S. at 881–86.
81. *Casey*, 505 U.S. at 936 (Blackmun, C.J., concurring in part and dissenting in part) (citing Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 764 (1986)).
82. *Casey*, 505 U.S. at 918 (Stevens, J., concurring in part and dissenting in part).
83. *Casey*, 505 U.S. at 919 (Stevens, J., concurring in part and dissenting in part).

The Court's treatment of spousal consent requirements invokes familiar stereotypes that pit a woman's judgment against that of her husband. Although the Court invalidated a spousal consent requirement in *Danforth*,[84] it characterized the interests of the husband in one-dimensional and glowing terms while suggesting that a woman who fails to gain the approval of her husband prior to an abortion may be responsible for destroying the marriage. The Court lauds the "deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy" and opines that "[n]o marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue."[85] But the responsibility for the harmony rests primarily on the woman. A woman who, "without the approval of her husband, decides to terminate her pregnancy . . . is acting unilaterally."[86] This depiction of marital bliss ignores, of course, the reality that fear of violence or other abuse may be the reason a wife may not discuss the abortion decision with her husband.[87]

The Court recognizes this reality in *Casey* when it invalidates the Pennsylvania spousal notification provision, but it does so in language that both repudiates stereotypes and reinforces them. The joint opinion goes to great length to dismiss spousal notification requirements as the product of an era "when a different understanding of the family and of the Constitution prevailed,"[88] a time when "a woman had no legal existence separate from her husband"[89] and she was expected to fulfill "special responsibilities"[90] in the home that "precluded full and independent legal status under the Constitution."[91] But "[t]hese views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution."[92] Indeed, the opinion emphasizes:

> The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intru-

84. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 70 (1976).
85. *Danforth*, 428 U.S. at 69, 71.
86. *Danforth*, 428 U.S. at 71.
87. *See Casey*, 505 U.S. at 889 (stating the District Court's finding that notification of pregnancy is a frequent cause of family violence).
88. *Casey*, 505 U.S. at 896.
89. *Casey*, 505 U.S. at 897 (quoting Bradwell v. State, 16 Wall. 130, 141 (1873) (Bradley, J., joined by Swayne and Field, J.J., concurring in judgment)).
90. *Casey*, 505 U.S. at 897 (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)).
91. *Casey*, 505 U.S. at 897.
92. *Casey*, 505 U.S. at 897.

> sion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[93]

But the joint opinion's reasoning on spousal notification is not grounded primarily in the recognition of women's constitutional independence. Instead, it is the potential of domestic abuse that leads the plurality to conclude that the provision constitutes an undue burden.[94] The joint opinion's emphasis on domestic violence draws heavily on stereotypical views of women as victims.

Not surprisingly, the unreliable woman at times is characterized as a victim by virtue of her social vulnerability. But here, she typically gets little support from the Court. In three cases addressing government funding of abortion, the Court concluded that the state is under no constitutional obligation to fund an abortion sought by an indigent woman because it is the woman's poverty, not the state, that has created the obstacle to obtaining an abortion.[95] The result of these decisions, as Justice Blackmun argued in dissent, is "punitive and tragic."[96] These cases marked the first post-*Roe* decisions where the state's interest in promoting childbirth prevailed over the woman's right to choose. In *Carhart II*, the dissent argued that restrictions on late-term abortions are likely to disproportionately affect indigent women and adolescents, who "are more likely than other woman to have difficulty obtaining an abortion during the first trimester of pregnancy."[97] The economically and socially vulnerable women in these cases earn the Court's disdain, not its compassion.

The questioned and questionable woman is at the center of the Court's decision in *Carhart II*.[98] Although the opinion invokes multiple gendered archetypes, it is the woman's potential for faulty judgment that most concerns the Court. Her fragile emotional state makes it likely that a woman will "regret" her decision to abort and, as a result, suffer dire emotional consequences, including "[s]evere depression and loss of esteem."[99] Admitting there is "no reliable data" to support these conclusions, the Court nonetheless embraces a woman-protective rationale that bears little relevance to the medically driven choices typically associated with late-term

93. *Casey*, 505 U.S. at 896 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
94. *Casey*, 505 U.S. at 893–94.
95. Maher v. Roe, 432 U.S. 464, 474 (1977); Beal v. Doe, 432 U.S. 438, 447 n.15 (1977) (citing *Maher*, 432 U.S. at 482); Poelker v. Doe, 432 U.S. 519, 521 (1977) (citing *Maher*, 432 U.S. 464). *See also* Webster v. Reprod. Health Servs., 492 U.S. 490, 491–92, 509–11 (1989).
96. *Beal*, 432 U.S. at 462 (Blackmun, J., dissenting).
97. *Carhart II*, 550 U.S. 124, 173 n.13 (2007) (Ginsburg, J., dissenting).
98. 550 U.S. 124 (2007).
99. *Carhart II*, 550 U.S. at 159.

abortions.[100] It relies on an amicus brief containing personal testimonies of regret from women who had chosen abortion.[101] Ignored by the Court is the amicus brief that tells different stories, stories of women who needed the late-term procedure now banned by the Act.[102]

Not content with insisting on the psychological weakness of women, the Court claims that this weakness may make the informed consent process suspect. As the Court describes it, "[i]n a decision so fraught with emotional consequence some doctors may prefer not to disclose . . . the means that will be used."[103] This language is a gratuitous attack on women's moral authority, for the statute has nothing to do with informed consent.

The woman-protective rationale is the most recent expression of distrust of women's judgment. A woman must be protected from choosing an abortion because of the emotional harm she will suffer.[104] The argument remains a prominent political tool, despite the fact that medical authorities

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100. *Carhart II*, 550 U.S. at 159. *See also* Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 J.L. & POL'Y 15 (2008).

> Particularly noteworthy was the Court's reliance on an amicus brief containing testimonials against abortion that were also cited by a legislatively appointed, highly partisan South Dakota task force. The South Dakota legislature relied on the task force's factual findings in enacting a complete ban on abortions in South Dakota. Two anti-abortion lawyers who were architects of the South Dakota strategy acknowledged an implicit conversation between the South Dakota law's advocates and the Court on this point. They wrote that the South Dakota law and its defense in federal court have "been litigated with an eye towards Justice Kennedy" . . . and that "[i]t was not a coincidence that Justice Kennedy cited to [an amicus brief] which related the experiences of post-abortive women."

Id. at 28–29.

101. *Carhart II*, 550 U.S. at 159 (citing Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, et al as Amici Curiae in Support of Petitioner at 22–24, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05–380), 2006 WL 1436684 at *22–*24).

102. Brief of the Inst. for Reprod. Health Access et al as Amici Curiae in Support of Respondents in Gonzales v. Planned Parenthood Federation of America, et al., & Motion for Leave to File Brief Out of Time in Support of Respondents in Gonzales v. Carhart, et al., Gonzales v. Carhart, 550 U.S. 124 (2007) (Nos. 05–1382 & 05–380), 2006 WL 2736633.

103. *Carhart II*, 550 U.S. at 159.

104. REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, 9, 55, 65–67 (2005), *available at* http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf (discussing the need to protect the pregnant mother and her fundamental intrinsic right to a relationship with her child). This report was submitted to the Governor and Legislature of South Dakota in 2005.

have discredited the validity of a "post-abortion stress syndrome."[105] Justice Kennedy admits the claim is without "reliable data."[106] But the Court adopts this rhetoric of anti-choice proponents, rhetoric that amounts to a repackaging of deeply entrenched stereotypes about women's capabilities.

C. The Incredible Shrinking Woman

If at times the woman seeking an abortion is portrayed as a passive participant or an unreliable decision-maker, on other occasions her physical humanity disappears. Several of the Court's opinions reduce women to mere body parts, surrealistic depictions of woman as a womb disconnected from both body and dignity. Other opinions further dehumanize the woman, rendering her invisible by omitting her from the legal analysis. These portrayals literally deny women legitimacy and moral authority.

The most significant construct used to reduce woman to a disembodied "womb" is the Court's use of the viability standard. *Roe* defines viability as the point at which the fetus is "potentially able to live outside the mother's womb."[107] It is the womb that is the focus of this standard, irrespective of its incorporation in a woman's body. Even the reference to "mother's womb" reduces simply to "womb" in later opinions, as in *Casey*, where the plurality defines viability as "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb."[108] This language conjures an image of the fetus disengaged from the woman's body, making irrelevant the woman who maintains and nourishes the fetus prior to viability. The viability standard relies on the point at which prenatal life may be freed from its physiological dependency on the womb. Until that time the organ of gestation, the womb, is the reference point. At viability the state enters the womb to protect the fetus.

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105. Brief for Amicus Curiae Am. Psychological Ass'n in Support of Appellees at 14, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88–605), 1989 WL 1127695 at *14. *See also* Greenhouse, *supra* note 50.

> The Carhart majority opinion thus adopts the discredited theory of a "post-abortion syndrome" that inflicts lasting emotional damage on women who have had abortions. Although embraced by such organizations as Feminists for Life of America, where Jane Sullivan Roberts, the wife of Chief Justice Roberts, once served as executive vice president of the board of directors and currently as pro bono legal counsel, the theory has been widely debunked in the medical literature.

Id. at 56 (citing Kerri-Ann Kinorski, *The Aftermath of Abortion*, 5 AM. FEMINIST 6 (1998)).

106. *Carhart II*, 550 U.S. at 159.

107. Roe v. Wade, 410 U.S. 113, 160 (1973).

108. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).

In *Roe* and *Casey,* the Court may at times reduce woman to womb, but at least the opinions also recognize her rights and interests. Far more dramatic is the Court's treatment of women in the cases addressing "partial-birth abortion" laws.[109] *Carhart I* and *Carhart II* focus on the physician and the fetus; the woman is identified alternatively by her womb,[110] cervix, or vagina.[111] These dynamics are understandable to some extent since the statutes regulate a particular abortion procedure. But by deleting the woman from the scene, the Court leaves the impression that only the doctor and the fetus are impacted by the procedure. In *Carhart II,* the Court's focus on fetal life, discussed below, diminishes the physiological and moral significance of the woman. Justice Kennedy emphasizes, "a fetus is a living organism while within the womb, whether or not it is viable outside the womb."[112] With this language, the fetus gains an embodied identity that is not ascribed to the woman. Thus the woman, as womb, serves to nurture the "living organism"; she is depicted as the grammatical and physical addendum to the fetus and reduced to terminology that denies her essential personhood.

The ultimate diminishment of woman occurs in opinions where she is invisible, or nearly invisible. Chief Justice Rehnquist and Justices Scalia and Thomas have authored opinions about abortion that do not mention women. Rehnquist's dissent in *Carhart I,* urging the Court to overrule *Casey,* contains no references to women.[113] Likewise, the concurrence of Justice Thomas in *Carhart II,* also arguing that *Casey* and *Roe* should be overruled, does not once discuss the woman.[114] The plurality opinion in *Webster v. Reproductive Health Services,* written by Chief Justice Rehnquist, mentions the woman primarily when quoting statutory language or case precedent, choosing instead to focus almost exclusively on the interests of the state in regulating abortion.[115]

These depictions of women as female reproductive organs or as irrelevant to the abortion analysis create a narrative that powerfully denies personhood and moral authority. A woman who seeks an abortion does not deserve to be recognized as a complete being. Denied personhood, her value

109. One pair of physicians describes the term as an "evocative neologism" that is "intentional disinformation." *See* David A. Grimes & Gretchen Stuart, *Abortion Jabberwocky: The Need for Better Terminology,* 81 CONTRACEPTION 93, 93–94 (2010).

110. *Carhart II,* 550 U.S. 124, 147 (2007).

111. *Carhart II,* 550 U.S. at 135; *Carhart I* 530 U.S. 914, 940 (2000).

112. *Carhart II* 550 U.S. at 147.

113. *Carhart I,* 550 U.S. at 952.

114. *Carhart II,* 550 U.S. at 168–69.

115. 492 U.S. 490, 490–522 (1989) (The plurality opinion mentions "woman" thirty times, twenty-seven of which are in reference to statutory language or case precedent.).

derives from her fulfillment of state interests, i.e., the physical maintenance of prenatal life.

D. Woman on Top

The portrayal of woman as an autonomous moral authority, suggested, but not realized, in *Roe*, emerged eventually, thirteen years later, in *Thornburgh v. American College of Obstetricians and Gynecologists.*[116] In *Thornburgh*, the majority opinion of Justice Blackmun, who found the woman's voice missing in *Roe*, focuses on the liberty interests of the woman, not her physician, and it explicitly grants her both dignity and moral value:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision–with the guidance of her physician and within the limits specified in *Roe*–whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.[117]

The narrative of woman as a moral decision-maker reached its pinnacle six years later in *Casey*. The focus of the abortion decision is not the physician or the state, for "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."[118] Indeed, *Casey* recognizes "the urgent claims of the woman to retain the ultimate control over her destiny and her body [are] claims implicit in the meaning of liberty."[119] This liberty includes "the most intimate and personal choices a person may make in a lifetime."[120] *Casey* emphasizes that these intimate choices are "central to personal dignity and autonomy."[121] Dignity and autonomy are, in turn, essential to liberty.[122] Liberty, as *Casey* defines it, concerns the constitutional relationship between individual and government: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[123]

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116. 476 U.S. 747 (1986).

117. *Thornburgh*, 476 U.S. at 772.

118. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

119. *Casey*, 505 U.S. at 869.

120. *Casey*, 505 U.S. at 851.

121. *Casey*, 505 U.S. at 851.

122. *Casey*, 505 U.S. at 851.

123. *Casey*, 505 U.S. at 851.

This narrative is constructed on "woman," her autonomy and personhood, not her role as mother. She is recognized as a social actor with options other than motherhood. The attribution of these moral decisions to the woman represents a significant departure from prior narratives of dependence and incompetence. *Casey* identifies reproductive freedom as a central and self-defining facet of identity, a predicate to the realization of other social, economic, or political identities. Or, as the joint opinion explains, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[124]

This language joins reproductive choice, equality, and self-determination into a narrative of dignity missing from the *Roe* analysis of choice: "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[125]

Despite this strong language, *Casey* expresses considerable ambivalence about the autonomous woman. The opinion confronts the mother archetype at the same time as it reinforces the stigma imposed on women who choose to terminate pregnancies:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[126]

The Court describes mother as the noble human; "not-mother" is justified only because she may "suffer" in gestation and childbirth. The narrative of autonomy therefore is less a positive acknowledgement of a woman choosing "not-mother" than an expression of deference to those women who refuse to sacrifice their bodies and their destinies. But even that deference is double-edged, for "not-mother" is, by implication, selfish and ignoble. Thus, while not mandating the mother role, the Court suggests that "not-mother" is deficient: "That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the

124. *Casey*, 505 U.S. at 856.
125. *Casey*, 505 U.S. at 856.
126. *Casey*, 505 U.S. at 852.

eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice."[127]

Other passages present similar tension. In examining the scope of liberty, the Court recognizes that for some, a pregnant woman is inevitably mother: "One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being."[128] An alternative perspective, the Court acknowledges "is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent . . . ."[129] *Roe,* the joint opinion concludes, protects the woman's liberty to decide between these views. As the Court describes it, *Casey* reaffirms a pregnant woman's right either to embrace motherhood or to recognize her "inability" to be a mother.

This juxtaposition of conflicting narratives, a veritable verbal wink, undermines the persuasive value of the Court's otherwise powerful argument in support of woman's autonomy. But the *Casey* narrative of moral authority is compromised primarily by the constitutional standard employed by the Court. The undue burden standard, displacing the strict scrutiny standard of *Roe*, belies the very moral authority the Court purports to respect.[130]

E. Mommie Dearest

By playing the mother narrative against the principles of liberty and equality that support reproductive autonomy, *Casey* presents two familiar archetypes, the good mother and the bad mother. The good mother, the ennobled woman, as *Casey* constructs her, is the woman who carries her pregnancy to term; she has "endured" the physical and emotional hardships "with . . . pride."[131] The woman who chooses to end her pregnancy may also be assigned the nomenclature of mother, particularly in those opinions hostile to constitutional protection of choice.[132] She is, by implication, the bad mother, for only a bad mother would terminate the life inside her.

Here, the obvious should be stated, namely that while some women seeking abortions may view themselves as mother, particularly women confronting serious health risks or fetal abnormalities, most women do not. Often the Court's use of mother tracks the language of the statutes being

127. *Casey*, 505 U.S. at 852.

128. *Casey*, 505 U.S. at 853.

129. *Casey*, 505 U.S. at 853.

130. *See infra* notes 199–209 and accompanying text.

131. *Casey*, 505 U.S. at 852.

132. *Carhart II*, 550 U.S. 124, 141–43, 147–48, 153, 159–161 (2007).

challenged, but not always.[133] The Court's language is inconsistent, sometimes referring both to mother and woman in the same opinion. These dual references may be accidental, but it seems unlikely that the Justices are unaware of the potential impact of the language they choose, particularly in controversial decisions where every sentence is parsed for clues to unresolved issues.

In *Casey,* for example, the joint opinion referred to "woman" more than one hundred times and to "mother" only nine, three of which were quotes from *Danforth.*[134] The Court's strongest supporters of choice, Justices Blackmun and Stevens overwhelmingly discussed abortion in terms of woman rather than mother. Justice Blackmun used the term woman sixty-five times, mother eight, primarily when quoting language in other cases.[135] Justice Stevens referenced the woman thirty-five times, mother only twice.[136] Similarly, Justice Ginsburg, in her dissent in *Carhart II,* used the term woman thirty-nine times.[137] Only twice, when citing quotes, did she use mother.[138] By contrast, Justice Kennedy's opinion in *Carhart II,* describing the rights and interests at stake, referred to mother fifteen times, woman twenty-six.[139]

Carhart II's interchange of woman and mother implies parallel identities. By identifying woman as mother, the Court imposes judgment on her decision to abort. For the good mother, pregnancy and childbearing are profoundly fulfilling, for "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child."[140] The bad mother violates this "ultimate expression" of "respect for human life" by seeking to end "the bond of love the mother has for her child."[141] This moral repugnance toward the woman, regardless of her reasons for seeking an abortion, is evident in other passages. It is the "expectant mother" who seeks a late-term abortion, and, the state is justified in warning her of "the consequences that follow from a decision to elect a later-term abortion."[142] The

133. Compare Justice Blackmun's reference to the language of the Texas statute referring to "mother" with his later description of the statute as permitting abortions "necessary to preserve the pregnant woman's life." Roe v. Wade, 410 U.S. 113, 119, 129 (1973).

134. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

135. *Casey,* 505 U.S. 833 (1992) (Blackmun, J., concurring).

136. *Casey,* 505 U.S. at 912–22 (Stevens, J., concurring in part, dissenting in part).

137. *Carhart II* at 169–171.

138. *Carhart II,* 550 U.S. at 184–85 (citing *Casey,* 505 U.S. at 891, and Bradwell v. State, 16 Wall. 130, 141, 21 L.Ed. 442 (1873) (Bradley, J., concurring)).

139. *Carhart II,* 550 U.S. 124.

140. *Carhart II,* 550 U.S. at 159.

141. *Carhart II,* 550 U.S. at 159.

142. *Carhart II,* 550 U.S. at 160.

good mother, once she learns how her child will be "killed" may choose not to have an abortion.[143] The bad mother who proceeds with the abortion is likely to suffer moral anguish, for "a mother" may come to "regret her choice" and must "struggle with grief" when she learns what she did to her "child."[144] The Court's tendency to pair the term mother with the nomenclature "child," discussed *infra*, further reinforces the narrative of woman as inevitable mother. The inevitable mother may not choose to act in her own interests as a woman; her choice is whether to be a good mother or a bad mother.

The dissent excoriates the moralizing of the majority as "an antiabortion shibboleth for which it concededly has no reliable evidence;" one that is based on "ancient notions about women's place in the family and under the Constitution" that have "long since been discredited."[145] Debunking the "good mother" construct, Justice Ginsburg pointedly notes, quoting the majority: "Notwithstanding the 'bond of love' women often have with their children . . . not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity."[146]

Not surprisingly, the good mother constructed by the Court in *Carhart II* and other cases often is disassociated from the actual decision to seek an abortion. Responsibility for the choice may be attributed to "woman" or to third parties, but not to the mother, who is more frequently seen as the abortion recipient. In *Carhart II*, it is "mother" who has a bond of love with her "child" and "mother" who "comes to regret her choice," but it is "woman" who actually makes the choice.[147]

This depiction of mother as abortion recipient evokes traditional stereotypes of woman as passive object. The good mother does not choose abortion, and, historically, the woman has not been criminally liable for abortion: "[Parties] claim that most state laws were designed solely to protect the woman . . . [and thus] the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another."[148] One of the core principles of abortion jurisprudence, until *Carhart II*, required exceptions from abortion restrictions where necessary to protect the life or health of the woman. Although the Court may discuss these exceptions in relation to woman as well as mother, it

143. *Carhart II*, 550 U.S. at 159–60.

144. *Carhart II*, 550 U.S. at 159.

145. *Carhart II*, 550 U.S. at 183–185 (Ginsburg, J., dissenting).

146. *Carhart II*, 550 U.S. at 184 n.8 (Ginsburg, J., dissenting).

147. *Carhart II*, 550 U.S. at 159. *See also* Roe v. Wade, 410 U.S. 113, 137–47, 153 (1973) (using "mother" to refer to the health of the woman and "woman" to refer to the decisionmaker).

148. *Roe*, 410 U.S. at 151.

frequently employs the term mother as someone whose life or health needs protection by third parties. Both the state and the medical profession are charged with protecting the life and health of the "mother."[149]

The narrative of woman as mother marries powerful historical and cultural associations with purportedly neutral constitutional analysis. This narrative takes on even greater visibility when coupled with an examination of the terminology used by the Court to describe prenatal life.

III. Life As We Know It

The language used by the Court to describe prenatal life, like the language describing the abortion seeker, varies considerably. The variations from opinion to opinion suggest moral as well as legal judgments about abortion. It is important to examine this language for what it reveals about the different perspectives on prenatal life and, ultimately, about the woman who seeks an abortion. The pairing of the dual constructs of abortion seeker and prenatal life, with woman/fetus and mother/child representing opposite ends of the spectrum, completes the narratives about women. The Court often opts to use the terms woman and fetus together when acknowledging constitutional protection of the right to choose.[150] By contrast, the mother/child pairing typically appears when the Court is emphasizing protection of prenatal life.[151] The mother/child terminology contributes to abortion stigma by furthering the narrative of the bad mother. The personification of the fetus also generates abortion stigma by equating abortion with murder.

A. Biology

The description of prenatal life as a stage of biological development correlates most frequently with discussion of abortion as a medical procedure. The use of scientific terms lends neutrality to the Court's analysis, unlike the politically charged and biologically inaccurate description of pre-

149. *See, e.g.*, *Carhart II*, 550 U.S. at 160 ("The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S 833, 879 (1992) ("We also reaffirm *Roe*'s holding that 'the State . . . may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'"); *Roe*, 410 U.S. at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester.").

150. *See, e.g.*, *Casey*, 505 U.S. at 873.

151. *Carhart II*, 550 U.S. at 159–60.

natal life as a "child."[152] Thus, it is not surprising that the Court's description of prenatal life as biology also pairs with the narrative of woman as autonomous being, not as mother.[153]

The Court's use of the term "fetus" typically occurs where the emphasis is on the distinction between prenatal life and a legal "person."[154] *Roe*, of course, specifically held that a fetus is not a "person" within the meaning of the Fourteenth Amendment.[155] Similarly, Justice Stevens, in *Thornburgh*, explains, "there is a fundamental and well-recognized difference between a fetus and a human being."[156] In *Roe*, the Court referred to the differences between a "quick" and "unquickened fetus" when describing the history of abortion regulation.[157] Fetus also is the preferred term used by the Court when defining viability or the constitutional consequences of viability.[158] Thus, it is "fetal viability" that delineates the point at which the state's interests may prevail over those of the woman.

This terminology, along with other references to biological stages, such as "potential life of an embryo," demarcates the pre-viable fetus from the human person. The Court's use of the term fetus defuses the construct of the conflict of rights invoked when prenatal life is described as a "child." The constitutional protection given the woman's right to choose matches best with an explanation that juxtaposes a biological process with the rights and interests of a born human. Thus, it is not surprising that as the Court has become more hostile to the right to choose, the preferred description of prenatal life has moved from the scientific neutrality associated with the term fetus and been replaced with more politically charged nomenclature for prenatal life.

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152. *See infra* notes 152–172 and accompanying text.

153. *Carhart II*, 550 U.S. at 145–146.

154. A fetus is the stage of development dating from eight weeks after conception. The Court rarely uses the term "embryo." It typically associates embryo, accurately, with early development (an embryo is "the young of a viviparous animal, especially of a mammal, in the early stages of development within the womb, in humans up to the end of the second month." *Embryo Definition*, DICTIONARY.COM UNABRIDGED, http://dictionary.reference.com/browse/embryo (last visited Oct. 31, 2012). Occasionally the Court interchanges the use of embryo and fetus, blurring the developmental distinctions. *See, e.g.*, *Roe*, 410 U.S. at 150 ("Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail.").

155. *Roe*, 410 U.S. at 157.

156. Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 778–79 (1986).

157. *Roe*, 410 U.S. at 132–38.

158. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992).

B. Beyond Biology

At times, Justices on both sides of the debate describe prenatal life in language that is non-scientific and politically charged. Justice Stevens, in his dissent in *Webster*, quotes from St. Thomas Aquinas when he describes prenatal life before "sensation and movement" as a "seed."[159] Stevens argues that the preamble to the Missouri statute violates the First Amendment by stating that life begins at conception: "a woman's constitutionally protected liberty encompasses the right to act on her own belief that – to paraphrase St. Thomas Aquinas – until a seed has acquired the powers of sensation and movement, the life of a human being has not yet begun."[160]

More typically, and certainly more recently, the references to prenatal life in political terms are found in those opinions hostile to a woman's right to choose. The use of the terms "child" or the "unborn" elevates prenatal life to the equivalent of a born human. This terminology alone goes a long way toward constructing a narrative of rights and protections afforded to prenatal life. Describing prenatal life as the unborn or as a child is not a new phenomenon in the Court's opinions. *Roe* claimed that ancient Greek and Roman law provided "little protection to the unborn."[161] In describing the evolution of the American Medical Association's position on abortion, the Court quoted from an 1859 AMA report criticizing laws that fail to respect "the independent and actual existence of the child before birth, as a living being."[162] After *Roe*, the Court began to entertain challenges to laws restricting abortion that frequently described prenatal life as the "unborn child."[163] Over time, the Court began to incorporate the language of these statutes and similar language used in anti-choice briefs submitted to the Court.[164]

Casey marks the ascendancy of the state's interest in protecting prenatal life as demonstrated rhetorically by the Court's increasing use of the term "unborn."[165] Unlike the biological terms of fetus and embryo, the un-

159. Webster v. Reprod. Health Servs., 492 U.S. 490, 567–69 (1989) (Stevens, J., concurring in part and dissenting in part).

160. *Webster*, 492 U.S. at 572. (Stevens, J., concurring in part and dissenting in part).

161. *Roe*, 410 U.S. at 130.

162. *Roe*, 410 U.S. at 141–42.

163. *See, e.g.*, *Webster*, 492 U.S. at 500 n.1 (citing MO. REV. STAT. §§ 1.205.1(1)–(2), §1.205.2 (1986)).

164. *See, e.g.*, *Carhart II*, 550 U.S. 124, 159 (2007) ("[I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.") (citing Brief for Sandra Cano et al. as Amici Curiae Supporting Petitioner, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05–380) (2006 WL 1436684)).

165. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (using the term unborn slightly more often than the term fetus). *Cf. Roe*, 410 U.S. 113 (referring to prenatal life as a fetus more than twice as frequently as using the term unborn).

born is a construct. Unborn evokes the image of fully formed life and personhood that differs from a born person only by a biological technicality. As constructed by the Court, the unborn has an identity and interests separate from the pregnant woman. As *Casey* describes, "[t]he woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn."[166]

The shift in *Casey* to recognizing the interest of the state in protecting prenatal life throughout the pregnancy, discussed *infra*, pits the pregnant woman against the state from the time of conception. Defining prenatal life as the unborn enhances the moral authority of the state to engage in this conflict. As protector of this technically-not-born person, the state "may express profound respect for the life of the unborn."[167] The embodiment of prenatal life as the unborn, from the moment of conception, reinforces the woman as mother narrative. It characterizes the pregnancy not as a process but as a more or less static condition that sustains a formed life until it can be born. The pregnant woman thus becomes a carrier of a technically-not-born person. As carrier of the unborn, she is expected to be caretaker, to recognize the otherness of the life within.

The narrative of prenatal life as the unborn takes on heightened authority when "unborn" joins with "child." The Court's references to the unborn child complete the picture of prenatal life as independent being, a temporary resident of the womb who is waiting to be born. Justice Scalia typically describes prenatal life as a child: "The method of killing a human child—one cannot even accurately say an entirely unborn human child—proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion."[168] Justice Kennedy's opinion for the Court in *Carhart II* repeatedly uses the term unborn child, in both routine prose, "Abortion methods vary depending . . . on the term[s] of the pregnancy and the resulting stage of the unborn child's development," and in highly charged descriptions of abortion, ". . . that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child."[169] Justice Kennedy at times joins the terms fetus and child, identifying prenatal life as "the fetus that may become a child."[170] This language, while recognizing the biological stage of development and the biological process, ultimately draws its impact from the term child by the linkage of biology with an image of a born child. The depiction of prenatal life as a child creates the strongest narrative for woman as inevitable mother. This narrative is explic-

166. *Casey*, 505 U.S. at 869.
167. *Casey*, 505 U.S. at 877.
168. *Carhart I*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).
169. *Carhart II*, 550 U.S. at 134, 160.
170. *Carhart II*, 550 U.S. at 146, 158.

itly evoked by Justice Kennedy's description of pregnancy, "Respect for human life finds an ultimate expression in the bond of love the mother has for her child."[171] He goes on to describe the regret women may feel if they choose to "abort the infant life they once created and sustained."[172]

The construction of prenatal life as child or the unborn transforms the fetus into an identity that readers visualize as akin to born humans. And this yet unborn child is "sustained" by the love of her mother. In the language of the Court it is this identity, and this relationship, that a woman seeking an abortion chooses to terminate. It is this very violation of the mother-child relationship that is central to the generation of abortion stigma.

Quite independent of the mother/child narrative, the personification of the fetus advances abortion stigma in other ways. First, the description of prenatal life as a child gives a false impression of the independence of the fetus from the woman, her body, and her life. Identifying the fetus as a child diminishes the presence of the woman and her moral authority in favor of a moral imperative to protect the "child." Further, the personification of the fetus functions to associate abortion with murder.

The language employed by the Court is not the sole generator of abortion stigma, however. We must also examine the Court's abortion jurisprudence to see how it reinforces the Court's rhetoric.

IV. Lost in Translation

Language is a powerful generator and reinforcer of abortion stigma. But legal standards also serve similar functions. An assessment of abortion stigma in the Court's abortion jurisprudence must be informed by the relationship between the abortion narratives in the opinions and the constitutional standard joined with these narratives. The standards articulated in *Roe* and *Casey*, the two landmarks of abortion jurisprudence, do not necessarily correlate to the abortion narratives invoked in each decision. In fact, the narratives are in tension with the constitutional parameters set for regulating abortion. For example, the Court's original narrative, constructed in *Roe*, presents the woman as primarily a passive recipient of medical judgment. This narrative is paired, however, with a constitutional standard highly protective of women's autonomy. By contrast, the *Casey* narrative generally may be highly supportive of women's reproductive self-determination, but it is coupled with a standard that weakens these constitutional values. A brief comparison of *Roe* and *Casey* highlights the impact of legal standards on abortion stigma.

171. *Carhart II*, 550 U.S. at 159.

172. *Carhart II*, 550 U.S. at 159.

A. Roe

Roe grounded the right to choose in a right of privacy protected by the liberty clause of the Fourteenth Amendment.[173] Privacy, of course, is not explicit in the constitutional text. The right of privacy, the Court explained, derived from a long line of cases protecting the right of the individual to be free from unwarranted government intrusion into significant personal decisions.[174] These cases focused particularly on situations where the government intruded into matters relating to marriage, procreation, and family relationships.[175] The *Roe* Court concluded that the right of privacy, grounded in the Fourteenth Amendment's "concept of personal liberty," is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[176]

The Court did not analyze why the right of privacy included the right to choose other than to list several potential adverse effects of compelled pregnancy.[177] The Court did describe the "detriment" that state denial of access to abortion imposed on a pregnant woman.[178] That detriment included the potential for physical and psychological harm.[179] The Court twice referred to the possible "distress" imposed, a term that suggests emotional vulnerability.[180] The distress described by the Court appears to be primarily medical. The Court explains that "specific and direct harm medically diagnosable" may be involved.[181] It describes the likely imminence of "psychological harm" where access to abortion is prohibited and suggests, "Mental and physical health may be taxed by child care."[182]

Thus, despite the statement by the Court suggesting that broad principles of personal liberty supported the right to choose, *Roe* described the essence of the right in far narrower medical terms. This characterization dovetails with the Court's extensive explanation of the medical history of abortion regulation earlier in the opinion.[183] The Court's focus on the medical implications of compelled pregnancy is even more apparent when the

173. Roe v. Wade, 410 U.S. 113, 152–55 (1973).

174. *Roe*, 410 U.S. at 152–55.

175. *Roe*, 410 U.S. at 152–55.

176. *Roe*, 410 U.S. at 153.

177. *Roe*, 410 U.S. at 153.

178. *Roe*, 410 U.S. at 153.

179. *Roe*, 410 U.S. at 153.

180. *Roe*, 410 U.S. at 153.

181. *Roe*, 410 U.S. at 153.

182. *Roe*, 410 U.S. at 153.

183. *See Roe*, 410 U.S. at 153 (discussing ancient approaches to abortion law as well as those of the common law, English statutory law, and American law).

Court rejects an argument that the right to choose involves an unlimited right to control one's body.[184]

The right to choose may be grounded in privacy, but as early as *Roe*, the Court was already separating abortion from other privacy rights. After initially describing protection of the right to choose as consistent with the line of cases protecting marital and family privacy, the Court disavows this linkage by claiming that the right to choose "is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education."[185] The inherent difference is the presence of prenatal life in the form of an embryo and, later, a fetus.[186] This difference substantially restricts the meaning of the right to choose. As the Court describes the right, "the pregnant woman cannot be isolated in her privacy."[187]

The Court's willingness to define the abortion decision as a battle for control of the woman's womb ultimately demonstrates the limited conception of the right articulated in *Roe*. The *Roe* analysis does not view the right to choose as a constitutionally necessary manifestation of the self-determination and equality rights of women. To the contrary, *Roe* pays scant attention to the decision-making authority of women, or to the relationship between reproductive self-determination and the ability of women to participate equally in the public sphere.

This medically-based standard, resting more on the authority of the physician and the state than on the decision-making authority of the woman, furthers the narratives of woman as passive and lacking intellectual and emotional judgment. The medical model also served to avoid questions relating to the moral authority of women. Deeply entrenched skepticism of women's authority may have led the Court to focus this seminal and controversial decision on firmer historical ground. Whatever the reason, the medical model of abortion decision-making did little to dispel the view that a woman's decision on whether to have an abortion should be directed by her physician or by the state.

But if the meaning of the right to choose depicted by the *Roe* Court lies primarily in protecting the right of a woman to be free from the medical consequences of compelled pregnancy, the constitutional standard employed by the Court served a far more generous function. The trimester analysis adopted in *Roe* left the woman generally unfettered by state interference during the first trimester of pregnancy and subject only to laws intended to protect maternal health during the second trimester. It was not

184. *Roe*, 410 U.S. at 154.

185. *Roe*, 410 U.S. at 159.

186. *Roe*, 410 U.S. at 159.

187. *Roe*, 410 U.S. at 159.

until viability that an interest other than maternal health justified regulation. At viability, the state could regulate to protect prenatal life, including banning abortions as long as exceptions were made to protect the life or health of the woman.[188]

By applying strict scrutiny to laws regulating abortion, the Court protected the autonomy and decision-making authority of the woman, generally, up until viability. Even if this authority was portrayed as the physician's medical judgment, in reality the choice of the woman was substantially protected from state interference prior to viability.[189] In a series of decisions following *Roe*, the Court strictly scrutinized regulations purporting to protect maternal health, invalidating twenty-four-hour waiting periods and intrusive informed consent requirements because they were not narrowly tailored to real health concerns.[190]

The irony of *Roe* is that the constitutional parameters set by the Court for regulating abortion provide far greater protection of women's self-determination and autonomy than could be discerned simply from reading the Court's minimalist description of the right to choose. The trimester approach carved out a period of autonomous decision-making that required the state to abstain from interfering with the woman's decision. The adoption of strict scrutiny as the standard for reviewing abortion regulation ensured the Court would aggressively protect this autonomy.

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188. *Roe*, 410 U.S. at 164. The trimester approach adopted in *Roe* recognized that the state has a legitimate interest in protecting maternal health throughout the pregnancy. This interest becomes compelling at the end of the first trimester, when health risks from abortion may equal or surpass those from childbirth. At this point, the state could reasonably regulate to protect maternal health.

189. The Court consistently failed, however, to protect the abortion decisions of women dependent on public funds. *See* Maher v. Roe, 432 U.S. 464, 474 (1977); Beal v. Doe, 432 U.S. 438, 447 n.15 (1977) (citing *Maher*, 432 U.S. at 482); Poelker v. Doe, 432 U.S. 519, 521 (citing *Maher*, 432 U.S. 464). *See also* Webster v. Reprod. Health Servs., 492 U.S. 490, 491–92, 509–11 (1989).

190. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71–72 (1976); *Akron I*, 462 U.S. 416, 442 (1982); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986). *See also* Greenhouse, *supra* note 50 (discussing how the Court's discourse began to include liberty interests, the author notes that "Justice Blackmun's files from [*Thornburgh*] contain an article . . . noting the 'tension between the Court's systematic deference to the physician and the conflicting notion . . . that the woman has at stake a privacy right independent of and entitled to greater constitutional protection than the interests of her doctor'" (citing Susan Frelich Appleton, *Doctors, Patients, and the Constitution: A Theoretical Analysis of the Physician's Role in "Private Reproductive Decisions,"* 63 WASH. U. L.Q. 183, 218–19 (1985))).

B. Casey

Nineteen years later, the Court revisited the controversial analysis of *Roe*.[191] This time the Court had a great deal more to say about the right to choose. The joint opinion authored by Justices O'Connor, Kennedy, and Souter, opens with a clear statement of the constitutional value at stake: "Liberty finds no refuge in a jurisprudence of doubt."[192] The Due Process Clause of the Fourteenth Amendment provides that no State "shall deprive any person of life, liberty, or property without due process of law."[193] As the Court makes clear, "the controlling word in the cases before us is 'liberty.'"[194] Indeed, the Court recognizes "the urgent claims of the woman to retain the ultimate control over her destiny and her body [are] claims implicit in the meaning of liberty."[195]

These are grand words, indeed, and the joint opinion, in many ways, embodies the narrative of woman as the capable and autonomous decision maker. But in *Casey*, the Court rejects strict scrutiny of laws regulating abortion and replaces it with the undue burden test, inviting additional restrictions on abortion and access to abortion services.[196] The undue burden test not only changes the level of scrutiny, it also shifts the burden from the state to the plaintiff, making it more difficult and costly for plaintiffs to prevail.[197] The strict scrutiny standard of *Roe* signified the Court's skepticism of state regulation of abortion. *Casey*, by contrast, relocates the Court's skepticism from state to woman by requiring the plaintiff to prove undue burden. With this test of diminishing protection for woman's autonomy comes the Court's clear message that one of the primary errors of the *Roe* framework was the lack of weight given to the state's interest in protecting prenatal life throughout the pregnancy.[198]

The undue burden test of *Casey* thus embodies conflicting narratives about women and abortion. The Court describes an undue burden as one

191. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

192. *Casey*, 505 U.S. at 844.

193. U.S. Const. amend. XIV, § 1.

194. *Casey*, 505 U.S. at 846. The Court's emphasis is significant. In embracing liberty as the constitutional value underlying choice, the Court omits any reference to the right to privacy that formed the core of the *Roe* analysis. It offers no explanation as to why liberty, rather than privacy, is now the operative constitutional value. The Court instead obscures the shift in terminology, describing the line of cases protecting reproductive choice in contraception as matters central to the liberty protected by the Fourteenth Amendment without mentioning the right of privacy. *Casey*'s point, implicit rather than explicit, is that liberty subsumes privacy.

195. *Casey*, 505 U.S. at 869.

196. *Casey*, 505 U.S. at 878–79.

197. *Compare Casey*, 505 U.S. at 878–79, *with* Roe v. Wade, 410 U.S. 113, 156 (1973).

198. *Casey*, 505 U.S. at 869, 872–73.

that, by purpose or effect, places a substantial obstacle before a woman seeking abortion.[199] *Casey* overrules prior decisions invalidating twenty-four-hour waiting periods and restrictive informed consent requirements.[200] In doing so, the Court upholds Pennsylvania's twenty-four-hour waiting period and informed consent procedures, despite evidence that these restrictions impose economic hardship and emotional stress on women seeking abortions.[201] The joint opinion acknowledges the increased costs and delay imposed by the laws but ultimately concludes: "a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal."[202]

The potential for conflict between the undue burden standard and *Casey's* encouragement of laws designed to deter women from abortions is problematic. *Casey* provides little guidance for distinguishing permissible laws intended to deter women from abortions from impermissible laws that pose a substantial obstacle. Even more problematically, the Court's acceptance of laws designed to deter women from choosing abortion is inconsistent with its description of an undue burden as a law that by *purpose* or effect constitutes a substantial obstacle to the right to choose.[203] The impact of *Casey* has been to encourage regulations that impede women's access to reproductive health services in furtherance of the state's interest in deterring abortions.[204]

Casey has been further undermined by the paternalistic opinion in *Carhart II*,[205] which shows so little respect for the concerns of the woman as to only mention her in the context of how she needs protection from her

199. *Casey*, 505 U.S. at 869, 872–73.

200. *Casey*, 505 U.S. at 881–82 ("To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far. . . ."); *Id.* at 887 (declining to consider facial challenge to twenty-four-hour waiting period).

201. *Casey*, 505 U.S. at 885–87. *See also id.* at 919 (Stevens, J., dissenting).

202. *Casey*, 505 U.S. at 878.

203. *Casey*, 505 U.S. at 877.

204. *See, e.g.*, Tex. Med. Providers Performing Abortion Serv. v. Lakey, 667 F.3d 570 (5th Cir. 2012) (holding that regulations mandating performance and viewing of ultrasound were not unconstitutional); Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir. 2000) (holding that regulations imposing licensing and operational requirements for physicians' offices and medical clinics performing at least five first-trimester abortions monthly were constitutional).

205. *Carhart II*, 550 U.S. 124 (2007).

own decisions.[206] As *Carhart II* demonstrates, the *Casey* standard elevates the interests of the state and diminishes the authority of the woman.[207] This diminution finds expression in *Carhart II* through two recurring portrayals: woman as vulnerable and incompetent and woman as inevitable mother.[208]

Roe paired a narrative of the passive woman with robust constitutional protection for her assertion of reproductive autonomy. In *Roe*, narratives of dependency reinforced abortion stigma, but this stigma was counterbalanced in large part by a legal standard that expressed dignity and authority. *Casey* serves as the mirror image of *Roe*, coupling an eloquent narrative of the equality and liberty interests of women with a legal standard that undermines the principles lauded by the Court. In *Casey*, abortion stigma is generated by the undue burden standard, a standard that authorizes the state to question and meddle with a woman's decision to seek an abortion. *Casey* sets the stage for the opinion in *Carhart II*. The narrative of the autonomous woman, mere dicta, disappears. What is left is the legal standard that invites government control and the corresponding narratives of women as objects of control.[209] *Carhart II* exemplifies the perfect marriage of language and law that both generates and reinforces abortion stigma.

V. UNFORGIVEN

Part I defined abortion stigma as a social construct that depicts abortion as deviant and marks the woman who seeks an abortion as failing to meet the prescribed ideals of womanhood. If we apply the components of stigma generation to the Court's treatment of abortion and women who seek abortions, we can see specifically how the Court mediates abortion stigma. To summarize, stigma is generated through a process of labeling, stereotyping, separation, and loss of status.[210] These components operate through power inequities that permit the construction of stereotypes and the consequences of disapproval or discrimination.[211] Thus, the question

206. Discussed *infra*, nn. 231–234 and accompanying text. *See, e.g.*, Reva Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 3 U. ILL. L. REV. 991, nn.142–43 (2007).

207. A central premise of the opinion was that the Court's precedents after *Roe* had "undervalue[d] the State's interest in potential life." *Carhart II*, 550 U.S. at 157 (quoting *Casey*, 505. U.S. at 873).

208. *Carhart II*, 550 U.S. at 159–60.

209. *Carhart II*, 550 U.S. at 159–60 (explaining how the woman is unlikely to be well-informed about the late-term abortion procedure and approving the state's interest in "ensuring so grave a choice is well-informed.").

210. Link & Phelan, *supra* note 38, at 367.

211. *Id.*

becomes whether the Court's abortion jurisprudence functions to ostracize the abortion procedure and the woman who seeks an abortion.

Much of human experience involves differentiation and labeling. But some differentiation has significant social power, particularly distinctions based on race and gender. Labeling and stereotyping based on these characteristics may be automatic and preconscious.[212] The stereotypes displayed in the abortion cases are not surprising; until *Casey*, the Court showed little interest in tackling the gender stereotypes at the heart of much abortion regulation.[213] *Casey* acknowledges the gender issues but fails to employ a constitutional standard with enough teeth to invalidate laws based on gender stereotyping.

The most obvious cultural stereotypes appear in cases where the Court employs narratives that portray women as flawed decision makers and inevitable mothers. As discussed in Parts II and III, these narratives generate abortion stigma primarily through language, a powerful mediator of morality.[214] The vocabulary employed by the Court reinforces negative stereotypes about abortion and women. These stereotypes mark the woman who seeks an abortion as aberrant; her judgment is morally suspect because she seeks, even temporarily, to avoid the role of mother.

As discussed in Part IV, abortion stigma is also produced through constitutional standards and analysis, from *Roe* to *Carhart II*, that give credence to the view of woman as passive object who needs the direction of physician and state to make sound decisions. Other elements of the Court's abortion jurisprudence also contribute to the generation of abortion stigma. How the Court frames the discourse about abortion and the woman who seeks an abortion combines powerfully with the Court's terminology to reinforce negative stereotypes.

Oversimplification of complex characteristics and situations is essential to differentiation and stereotyping.[215] A woman's decision to terminate a pregnancy is likely to involve complex personal, social, and economic considerations. The Court's portrayal of both the abortion procedure and the woman tends, however, to oversimplify the issues and context involved.

The Court characterizes abortion as an atypical medical procedure. Rather than recognize its presence on the spectrum of reproductive health

212. *Id.* at 369.

213. Abrams, *supra* note 59, at 488–89.

214. Link and Phelan describe the importance of language, labeling, and stereotyping by reference to an experiment testing the subjects' responses to a vignette. Half of the subjects were told the vignette involved former mental patients; the other half believed the vignette concerned former back-pain patients. The responses differed dramatically depending upon the labeling. Link & Phelan, *supra* note 38, at 369.

215. *Id.*

care, the Court repeatedly distinguishes abortion from other reproductive decisions.[216] Significantly, the abortion cases fail to acknowledge the frequency of abortion in society. Nearly half of the pregnancies in the United States are unintended. Forty percent of these unintended pregnancies will be terminated by abortion.[217] The abortion cases, however, consistently choose to highlight the controversy surrounding abortion rather than its frequency. The Court thus differentiates abortion from the norm by portraying it as *sui generis*. This differentiation begins with *Roe*, where the Court examined in detail the moral, philosophical, and religious aspects of abortion but only briefly acknowledged that during the first trimester, abortion typically involves less medical risk to the woman than pregnancy.[218] Differentiation continues throughout the Court's abortion decisions, including in *Casey*, where the Court emphasized, "Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage."[219] This depiction of abortion as uncommon is consistent with widespread (and inaccurate) cultural attitudes toward abortion.[220]

Since *Casey*, the Court has validated laws that distinguish abortion from other medical procedures. Under the strict scrutiny standard of *Roe* the Court struck down laws mandating twenty-four-hour waiting periods and intrusive informed consent requirements.[221] The Court rejected these restrictions largely because it found no compelling justification for treating abortion differently from other medical procedures.[222] *Casey* and *Carhart II*, by contrast, defer to the legislative treatment of abortion as unique. *Casey*, by overruling *Akron I* and *Thornburgh* and upholding informed consent and waiting period restrictions that target only abortion, permits abortion to be isolated as an atypical procedure.[223] In *Carhart II* the Court accepts the argument that the contemplation of a late-term abortion is sufficient justification for government interference with the doctor-patient relationship.[224]

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216. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992); Roe v. Wade, 410 U.S. 113, 159 (1973).

217. GUTTMACHER INSTITUTE, *Facts on Induced Abortion in the United States* (Aug. 2011), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.html.

218. *Roe*, 410 U.S. at 149–50.

219. *Casey*, 505 U.S. at 850.

220. Studies show that underreporting of abortion is substantial and occurs for complex cultural reasons. J. Richard Udry et al., *A Medical Record Linkage Analysis of Abortion Underreporting*, 28 FAMILY PLANNING PERSPECTIVES 229 (1996), *available at* http://www.guttmacher.org/pubs/journals/2822896.html.

221. *See* Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 764 (1986); *Akron I*, 462 U.S. 416, 452 (1983).

222. *Thornburgh*, 476 U.S. at 783; *Akron I*, 462 U.S. at 427.

223. *Casey*, 505 U.S. at 882.

224. *Carhart II*, 550 U.S. 124, 159 (2007).

The association of abortion with uncommonness readily evokes the taint of questionable morality. *Casey* sends highly mixed messages about the morality of abortion. It defends the constitutional basis for the right to choose yet states unequivocally, "Some of us as individuals find abortion offensive to our most basic principles of morality."[225] This statement of moral disgust is couched in terms of constitutional imperative because moral approbation "cannot control our decision."[226] The Court, reluctantly, must subvert morality to duty: "Our obligation is to define the liberty of all, not to mandate our own moral code."[227] Thus, the Court sets liberty apart from morality. In doing so, it implies that abortion is immoral but must be tolerated because of the generosity of our constitutional tradition. *Carhart II* goes further, treating abortion as abhorrent. The case involves only late-term abortions, but the Court's disgust with abortion is more generalized. *Carhart II* engages in graphic and detailed descriptions of late-term abortions that simultaneously personalize the fetus and vilify the physician.[228] The dominance of this imagery in the opinion appears excessive when one considers that only 10–15% of abortions occur after the first trimester. The extensive depictions of fetal body parts and surgical mutilations convey revulsion with abortion in general, not just late-term.

The Court's decision to allow legislatures to eliminate the discretion of physicians to act in the best health interests of women marks abortion as

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225. *Casey*, 505 U.S. at 850.

226. *Casey*, 505 U.S. at 850.

227. *Casey*, 505 U.S. at 850.

228. [T]he surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger. [T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening. The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents.

Carhart II, 550 U.S. at 138.

[The doctor] went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms-everything but the head. The doctor kept the head right inside the uterus . . . . The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp . . . He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.

Carhart II, 550 U.S. at 138–39.

separate from, and inferior to, traditional medical practice. The Court justifies this variance by emphasizing that the legislature should have the authority to address the "moral concerns" at issue.[229] The marginalization of abortion also occurs through the Court's repeated description of physicians who perform the procedure as "abortion doctors," isolating these practitioners from mainstream medicine.[230] In fact, the entire "woman-centered" protectionist analysis central to *Carhart II* functions to establish abortion as a "catastrophic" experience.[231]

Once the abortion procedure is deemed aberrant, it is predictable that women who seek the procedure will be considered deviant. Here is where the narratives about women constructed by the Court further negative stereotypes. The vulnerable and passive patient described in *Roe* is not an appealing figure, nor is she a figure with whom most modern women would identify. *Casey*, once again, sends conflicting signals. It exalts the woman's right to shape her own destiny but cabins her autonomy. It praises her dignity while suggesting that her choice is immoral. It juxtaposes the stereotype of the self-sacrificing mother against the independent (i.e., selfish) woman.

Carhart II works on multiple levels to stigmatize the woman. She is dehumanized and devalued by the Court's continuing depiction of the woman as body parts. She is patronized by the Court's preoccupation with the emotional frailties to which it suspects she is prone. The opinion goes to great length to describe late-term abortion procedures in graphic detail. But nowhere in the opinion does it mention the fact that many, if not most, late-term abortions are performed for medical reasons.[232] To the contrary, *Carhart II* implies that the "killing" occurs for no particular reason.[233] This characterization of the procedure as a gruesome "abortion on demand" implicitly disparages the morality of the woman who would choose to "kill the fetus" in this manner.[234] A far more human and empathetic view of the woman would have emerged if the Court had acknowledged the frequent medical justifications for late-term abortions. Instead the Court opted for an inaccurate and unsympathetic portrayal, one that marginalizes the woman.

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229. *Carhart II*, 550 U.S. at 158.

230. *Carhart II*, 550 U.S. at 138, 144, 154–55, 161, 163.

231. Leslie Cannold, *Understanding and Responding to Anti-Choice Women-Centered Strategies*, 10:19 REPRODUCTIVE HEALTH MATTERS 171, 174 (2002).

232. Brief of the American College of Obstetricians and Gynecologists as Amicus Curiae Supporting Respondents at 10–16, Gonzales v. Carhart, 550 U.S. 124 (2007) (Nos. 05–380, 1382), 2006 WL 2867888 at *10–16.

233. *See Carhart II*, 550 U.S. at 139, 148, 158.

234. *Carhart II*, 550 U.S. at 129, 136, 140 (referencing to "kill the fetus" multiple times).

Carhart II further marginalizes the woman by associating abortion with mental instability. The political linkage of abortion with mental illness has been soundly debunked.[235] But the Court cites approvingly the amicus brief of Sandra Cano, a brief that contains anecdotes, not evidence, from women who claim that abortion caused them a variety of emotional and mental problems.[236] The Court's assertion that women who abort may suffer regret, "severe depression[,] and loss of esteem" validates traditional stereotypes of woman as emotionally unstable and easily damaged.[237]

Finally, one of the most powerful negative stereotypes is produced by the Court's description of abortion as involving "mother" and "child." This vocabulary suggests infanticide, not abortion, a characterization asserted by Justice Scalia.[238] It also draws on deeply entrenched stereotypes of woman as mother: mother who finds meaning, and her life's work, through childbearing; mother who sacrifices all, even her life, to protect her children. What kind of mother would "kill" her child? In fact, married women with infant children are among those most likely to seek an abortion.[239] Six in ten women who have an abortion already have a child.[240] These women typically describe a variety of economic and social reasons for seeking abortion, including the need to care for the children they have.[241] But the Court's abortion narratives fail to acknowledge fully the complex life circumstances that lead women, including women who are already mothers, to choose abortion. Instead, the "mother" who populates the Court's opinions is one-dimensional; she is labeled mother by virtue of her pregnancy, not her choice, and described as mother-who-terminates-the-life-of-her child. The Court, by employing this vocabulary, tracks the political discourse that depicts women who seek abortions as deviant from the norm, and reinforces both the negative stereotype and the deviancy.

Once abortion and the woman who seeks an abortion are characterized as deviant, separation and loss of status are likely. Underreporting of

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235. *See, e.g.*, Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, 9:3 GUTTMACHER POLICY REVIEW 8, 9–11 (2006), *available at* http://www.guttmacher.org/pubs/gpr/09/3/gpr090308.html.

236. *Carhart II*, 550 U.S. at 159.

237. *Carhart II*, 550 U.S. at 159.

238. *Carhart I*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) ("The method of killing a human child . . . .").

239. Kumar et al., *supra* note 30, at 629.

240. GUTTMACHER INSTITUTE, *Guttmacher Video: Abortion in the United States*, http://www.guttmacher.org/media/presskits/abortion-US/index.html (last visited Jan. 22, 2012).

241. *Id.*

the incidence of abortion is well documented.[242] The fact that many women who have abortions keep this information secret from family and friends is a strong indicator of the social stigma associated with abortion.[243] Abortion is subject to what some researchers describe as "the implicit rule of secrecy."[244] Recent data found that two out of three women who have abortions expected to be stigmatized if they told others about the procedure.[245] Fifty-eight percent of women said they needed to keep the procedure secret from friends and family.[246] Women with children are less likely to admit to an abortion for fear of social exclusion.[247] Researchers have argued that this secrecy in turn sets up a "mutually reinforcing cycle" of regenerating abortion stigma.[248]

This stigma reflects social and political efforts to mark the woman who decides to terminate her pregnancy with shame, not dignity. The data showing underreporting of abortions and fear of social ostracizing strongly suggest that for many women, abortion today remains associated with shame. Shame, not surprisingly, was associated with abortion prior to *Roe,* when abortion was criminalized.[249] Shaming today is an overt political goal with the passage of highly intrusive laws that mandate physically invasive ultrasounds prior to an abortion or question a woman's judgment by forcing her to listen to a demeaning state-designed lecture on why she should reconsider her decision.[250]

Since the generation of abortion stigma depends on the depiction of the woman who seeks to terminate her pregnancy as deviant, as "other" than the norm, it is easy to see how social inequalities are important to the creation of stigma. The social and political treatment of abortion makes clear the power disparities at play. The fact that abortion is a procedure that only women can undergo inevitably raises questions about social gender disparities. The political isolation of abortion as a medical procedure has been accomplished through varied legislation at the state and national level. This legislation includes restrictions on access to abortion through extended waiting periods, complex informed consent requirements, and prohibitions

242. GUTTMACHER INSTITUTE, *The Limitations of U.S. Statistics on Abortion* (Jan. 1997), http://www.guttmacher.org/pubs/ib14.html (last visited Jan. 22, 2012).

243. Norris et al., *supra* note 35, at S50.

244. *Id.*

245. *Id.*

246. *Id.*

247. Kumar et al., *supra* note 30, at 630.

248. *Id.* at 629.

249. Bourne, *supra* note 33, at 229, 273.

250. *See, e.g.*, Woman's Right to Know Act, 2011 N.C. Sess. Laws 405; TEX. HEALTH & SAFETY CODE ANN. § 171.002 (West 2011) ("[R]elating to informed consent to an abortion.").

on medication abortions.[251] It includes targeted regulation of abortion providers that subject them to cumbersome and costly restrictions not borne by other medical providers.[252] It also includes exclusion of abortion coverage from public and private health care.[253]

Some of these restrictions impact any woman who seeks an abortion. But many of the restrictions are particularly burdensome for low-income women, whose government-funded health care often excludes abortion or who must find the resources to travel for an abortion and sit out the waiting periods. Abortion is devolving, in many states, to a procedure available primarily for the well-to-do.[254] The Court has long ignored the economic disadvantages and access disparities imposed on low-income women by these regulatory approaches.[255]

The relationship between the Court's abortion jurisprudence and the political and social movements concerning abortion is complex and certainly not linear.[256] We can think of landmark constitutional decisions as part of a judicial-social-political feedback loop. In the most direct sense, the constitutional standards articulated by the Court form the baseline for subsequent political action. Thus, *Casey's* undue burden standard invited efforts to regulate abortion in ways that would not have survived strict scrutiny under *Roe. Carhart II* is consistent with the letter, if not the spirit of *Casey.*

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251. For a list of state legislation requiring delays and informed consent, see *Mandatory Delays and Biased Counseling for Women Seeking Abortions*, CENTER FOR REPRODUCTIVE RIGHTS (Sep. 30, 2010), http://reproductiverights.org/en/project/mandatory-delays-and-biased-counseling-for-women-seeking-abortions. *See also, e.g.*, ARIZ. REV. STAT. ANN. § 36–2153 (West 2012) (informed consent); N.D. CENT. CODE ANN. § 14–02.1–03.5 (West 2011) (regulating medication abortions); OKLA. STAT. ANN. TIT. 63, § 1–738.2 (West 2012) (informed consent); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2011) (informed consent).

252. Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir. 2000); *see also, e.g.*, 10A N.C. ADMIN. CODE 14E.0307 (West 2012) (requiring a registered nurse with post-operative or post-partum care experience be on duty in the clinic whenever patients are present); 10A N.C. ADMIN. CODE 14E.0207 (West 2012) (requiring that abortion clinics must provide eighteen specific components).

253. *See* Hyde Amendment, originally enacted as Departments of Labor and Health, Education, and Welfare Appropriation Act of 1977, Pub. L. No. 94–439, § 209, 90 Stat. 1418, 1434 (1976) (severely restricting the use of Medicaid funds for abortion). Section 1303 of the Patient Protection and Affordable Care Act authorizes states to prohibit abortion coverage by private providers participating in the health insurance exchanges. 42 U.S.C.A. § 18023 (West 2012).

254. *See* Rachel Benson Gold, *All That's Old Is New Again: The Long Campaign To Persuade Women to Forego Abortion*, 12 GUTTMACHER POLICY REVIEW (2009), *available at* www.guttmacher.org/pubs/gpr/12/2/gpr120219.html.

255. Maher v. Roe, 432 U.S. 464, 469–71 (1977). *See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

256. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1706–12 (2008).

The highly deferential application of the undue burden standard in *Carhart II* signaled clearly that the Court would be receptive to further requests to defer to legislative policy on abortion. These legislative policies are likely to further stigmatize abortion and the woman who seeks an abortion.

Additional messaging on abortion occurs beyond the pronouncement and application of legal standards. As this article argues, the narratives constructed by the Court through language and framing serve to reinforce stereotypes about women. These narratives that devalue the woman's judgment and define her as mother both reflect and advance political elements of the debate on abortion. Parties on both sides of the debate look to the Court for signals on how the Court might rule in future cases. These perceived signals, accurate or not, may significantly govern subsequent political action.

The generation and reinforcement of stigma has been a significant issue in the Court's analysis of equal protection. The decision in *Brown v. Board of Education* rested largely on the Court's conclusion that racially segregated schools stigmatized black children.[257] Gender discrimination cases tend to focus on whether gender-based government action is the result of archaic stereotyping of women.[258] But the Court has refused to consider regulation of abortion or pregnancy as triggering gender discrimination.[259] *Casey* acknowledged that stereotyping of women, particularly the woman as mother stereotype, was integrally related to abortion restrictions yet refrained from any formal analysis of gender discrimination.[260] The opinions of Justices Stevens and Blackmun in *Casey* urged the Court to consider the gender discrimination aspects of abortion regulation, as did the opinion of Justice Ginsberg in *Carhart II*, but the Court showed no inclination to move in that direction.

What the Court should address, independent of equal protection analysis, is whether laws that restrict abortion stigmatize women. As long as the right to choose abortion is a constitutionally protected activity, the Court should view with suspicion abortion regulations that stigmatize women. *Casey* laid the groundwork for the increasing stigmatization of abortion by expanding state authority to protect prenatal life throughout the pregnancy. This authority allows the state to "persuade" the woman to choose childbirth over abortion as long as it does not "coerce" her. This mythical distinction in fact operates by shaming. The state may not directly coerce the

257. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

258. U.S. v. Virginia, 518 U.S. 515, 533–34 (1996).

259. See, for example, the Court's infamous decision in *Geduldig v Aiello*, rejecting the argument that classifications based on pregnancy were gender-based classifications. Geduldig v Aiello, 417 U.S. 484, 494–95 (1974).

260. *Casey*, 505 U.S. at 896–97.

woman but it has the Court's blessing to shame her into a different decision. *Casey* creates a constitutional anomaly; the right to choose is constitutionally protected but the state is given the green light to discourage the exercise of that right through all means other than coercion. Other regulations mentioned throughout this article, such as mandatory ultrasounds and intrusive informed consent requirements, also have the purpose of shaming and stigmatizing a woman who decides to terminate her pregnancy. The *Casey* standard requires the Court to invalidate laws that by *purpose* or effect constitute an undue burden on the right to choose. Abortion regulations designed to stigmatize women pose a "substantial obstacle" to choice and thus constitute an undue burden.[261] *Casey* should be used to invalidate laws that stigmatize women.

The Court also should turn a critical eye to its use of language and framing. The Court's abortion decisions do not address the role of abortion stigma. Nor are they sensitive to how the Court may be generating and reinforcing abortion stigma through language and framing. The Court should not be in the business of reproducing negative attitudes toward women who are exercising a constitutional right. That it finds itself in this situation is due in large part to the Court's unwillingness, since *Roe*, to address deeply entrenched stereotypes about women and reproduction. Unless the Court is willing to confront how substantially these stereotypes impact abortion laws and lead to the generation of abortion stigma, it will continue to write decisions that employ the language and framing discourse of abortion stigma.

CONCLUSION

The Court's ambivalence about abortion is reflected in its willingness to uphold burdensome restrictions on access to the procedure. But this ambivalence also finds pervasive expression in the Court's increasing inclination to stigmatize abortion and the women who seek abortion. The Court's abortion decisions are closely examined by all sides of the abortion controversy for insights on how the Court is likely to resolve the next round of litigation. Its reinforcement of abortion stigma, intended or not, contributes to the political hostility towards women who decide, for whatever reason, to terminate a pregnancy. Abortion stigma should be a concern for the Court, for its gendered judgment of women and for the burden it places on women who seek to exercise their constitutional rights.

261. *Casey*, 505 U.S. at 877–78.